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No. 91-3

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1991

RONALD O. PELLETIER, et al.,

*Petitioners,*

v.

GARY D. ZWEIFEL,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Respondent respectfully objects to the Questions which Petitioners assert are presented for review in this matter, and states, instead, the following:

1. Where the Court of Appeals, based upon a *plenary* and *de novo* review of the *entire record* from the District Court, and *considering the undisputed material facts in a light most favorable to Petitioners*, determined that: (a) the district court had properly granted Respondent's motion to dismiss certain of Petitioners' claim for failure to state a claim, and had further properly granted Respondent's motion for summary judgment as to the remaining claims, concluding that Petitioners' factual allegations were frivolous; (b) further determined that Petitioners, both of whom are attorneys, and both of whom participated in the transactions out of which these claims purportedly arose, knew at the time they brought the claims that they were frivolous, and that the complaint was brought and pursued by them in bad faith and vexatiously purely to harass Respondent and to extract a settlement from him; (c) further determined that Petitioners' appeal to the grant of Respondent's motions to dismiss and for summary judgment was frivolous under Rule 38 of the Federal Rules of Appellate Procedure ("App. Rule 38"); and (d) further determined that the district court had abused its discretion in failing to determine, upon Respondent's motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure ("Rule 11") to which Petitioners had the full and complete opportunity to respond, that Petitioners had violated

**QUESTION PRESENTED FOR REVIEW** – Continued

Rule 11, and in failing to impose sanctions against Petitioners – did the Court of Appeals improperly exercise its authority in: (a) concluding that the record before it demonstrated beyond any question that Rule 11 sanctions were in order, and that Petitioners should be liable for those sanctions jointly and severally; and (b) determining what the nature of those sanctions should be, and remanding the matter to the district court with the direction to impose sanctions in an amount equal to the reasonable attorneys fees, expenses of litigation, and court costs incurred by the Respondent in his defense, and in pursuing his motion for sanctions?

## LIST OF INTERESTED PERSONS

The following is a complete list of persons and entities with an interest in the outcome of this litigation:

| | |
|---|---|
| Trial Judge: | Hon. Orinda P. Evans |
| Petitioners: | Ronald O. Pelletier<br>Herbert P. Schlanger |
| Respondent: | Gary D. Zweifel |
| Petitioner Pelletier's Counsel: | Herbert P. Schlanger |
| Petitioner Schlanger's Counsel: | Mark I. Harrison<br>The law firm of<br>Harrison, Harper, Christian & Dicher |
| Respondent's Counsel: | Robert E. Hicks<br>Robert A. Bartlett<br>The law firm of<br>Hicks, Maloof & Campbell, A Professional Corporation |
| Other entities with an interest: | The law firm of<br>Lokey & Bowden |

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## OPINIONS BELOW

Petitioners have included in the Appendix to their Petition (the Appendix) copies of the Opinions entered by the district court and the Court of Appeals which are pertinent to their Petition.

## JURISDICTION OF THIS COURT

Respondent acknowledges that this Court has jurisdiction to consider the Petition.

## STATUTES AND RULE PROVISIONS INVOLVED

In addition to the provisions of the Federal Rules of Civil Procedure cited and quoted by Petitioners, Respondent respectfully advises the Court that the following statutes and rules are also involved in this matter, the text of which, in accordance with Rule 14.1(f) & (k) of this Court, are set forth in Respondent's Appendix hereto: Title 28, United States Code, Section 2106; Rule 38, Federal Rules of Appellate Procedure; Rules 12(b)(6), 43, and 78, Federal Rules of Civil Procedure; Rules 220-1, and 270-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia.

## STATEMENT OF THE CASE

### A. Introduction.

After an exhaustive *plenary* and *de novo* review of the record which had been amassed in the district court, consisting of two large boxes of exhibits and nine volumes of the record on appeal, the Eleventh Circuit Court of Appeals (the "Court of Appeals") concluded that the district court had properly granted Respondent's motions to dismiss and for summary judgment, and further concluded that the Petitioner Ronald O. Pelletier ("Petitioner Pelletier" or "Pelletier"), himself a lawyer, owner of a

company conducting a bar review course, and sophisticated businessman, and Petitioner Herbert P. Schlanger, his counsel ("Petitioner Schlanger" or "Schlanger") (both of whom are hereafter called "Petitioners"), had engaged in egregious conduct in violation of the standards imposed by Rule 11 and App. Rule 38 in bringing and pursuing, in bad faith and vexatiously, baseless claims against Respondent, who is also a lawyer, and was, for a time, counsel for their quarry in the transactions in which these baseless claims purportedly arose.

The Court of Appeals further determined that this conduct warranted the imposition of sanctions against Petitioners, jointly and severally, measured by the reasonable attorney's fees, expenses of litigation, and court costs incurred in Respondent's defense against their baseless claims in the district court, pursuing his motion for sanctions, and opposing their appeal to the district court's grant of his motions to dismiss and for summary judgment.

The Court of Appeals then remanded this case to the district court for a determination of the amount of those reasonable fees and expenses. Petitioners do not contest the determinations of the Court of Appeals as to Respondent's motions to dismiss and for summary judgment, or the imposition of sanctions upon them under App. Rule 38.

The printed opinion of the Court of Appeals, *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991), runs for 58 pages (141 pages in the Appendix to the Petition), and the recitation of the facts contained in the record by which the claims of Petitioners are determined to be baseless consumes 25 of those pages. *Id.* 1470-1495. (63 pages in the Appendix-App.4-67). Moreover, these facts are also interspersed throughout the remainder of the Court of Appeals' opinion as it analyzes Petitioners' claims, determines them to be baseless, and explains its reasoning and

supports its conclusions as to Petitioners' violations of Rule 11 and App. Rule 38, and the bases to support its determinations regarding the nature of the sanctions warranted by their conduct.

In analyzing these claims, the Court of Appeals, as Respondent before it, was confronted with the necessity of sifting through many subsidiary facts to ascertain that the conclusory allegations stated in Petitioners' complaint had no factual predicate, and that because of their intimate involvement in the transactions in which the claims asserted against Respondent purportedly arose, Petitioners knew their claims had no merit when they brought the complaint. A detailed examination of these subsidiary facts also revealed to the Court of Appeals that Petitioners brought the complaint and pursued this action in bad faith, and for the purpose of harassing Respondent, with the hope and expectation that they would force him to a quick settlement in an attempt to buy back his good name.[1]

Throughout the history of this case, Respondent, and the various federal and state courts which have addressed this controversy, have been confronted with many impertinent and immaterial allegations from Petitioners which are irrelevant to the legal issues involved, unsupported by the record, waste valuable judicial resources, and have caused Respondent to incur fees and costs to refute. Notwithstanding that Petitioners have not

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[1] A good name, of course, cannot be bought or sold.

> Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name robs me of that which not enriches him, and makes me poor indeed.

Shakespeare: *Othello*, Act III, scene iii, l. 151

challenged the correctness of the rulings of the Court of Appeals that all of their claims lack merit either because they failed to state claims or that there were no facts to support them, Petitioners continue to assert these baseless, impertinent, and irrelevant allegations before this Court. Respondent objects to, and refutes, the allegations regarding the history of this matter which Petitioners set forth as "fact" that are inconsistent with the facts as determined from the record by the Court of Appeals, and, instead, respectfully refers this Court to the Court of Appeals' recitation of the pertinent facts. Considering the volume of these subsidiary facts, which consume 67 printed pages of the Appendix, it would be difficult, if not impossible, to recite all of them in the body of this Response. Rather, Respondent will provide this Court with a synopsis of the more pertinent facts regarding the history of proceedings in this case, and the subsidiary facts which support the Court of Appeals' determination that in bringing and pursuing this matter Petitioners acted in bad faith, vexatiously, and with intent to harass Respondent into a quick settlement.

**B. Course of Proceedings and Dispositions Below.**

Petitioners filed the initial complaint against Respondent on January 30, 1986, asserting, in broad and general terms, conclusory allegations that Respondent committed violations of Sec. 10b of the Securities Exchange Act of 1934 and Rule 10(b)(5) promulgated thereunder (15 U.S.C. § 78j(b), the Georgia Securities Act (O.C.G.A. § 10-5-12(a)(2)), the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. § 1961 *et seq.*), and a number of pendent state law claims. The complaint sought substantial compensatory damages in excess of $1 million dollars, and punitive damages of approximately $2 million dollars. Petitioners had the complaint served on Respondent at the bankruptcy court at the conclusion

of a hearing in the related case of Buckhead House of Travel, Inc. ("BHT") in which Respondent and his law firm, Lokey & Bowden, successfully obtained relief from an order which had been previously entered by the bankruptcy court, without notice to them, purporting to assign to Pelletier claims of BHT against Respondent and Lokey & Bowden.

Respondent filed a motion to dismiss the complaint and all of its counts under Fed.R.Civ.P. 12(b)(6). At the first hearing conducted in this case less than one month after filing the initial complaint, the district court warned both Petitioners that they were "treading on mighty dangerous grounds" with the allegations of the complaint, and inquired of Schlanger, in the presence of Pelletier, "Are you familiar with Rule 11?" Schlanger replied that he was familiar with Rule 11 and did not think he was violating it, stating, "we have got more facts on this case than any . . . RICO case I know that's been filed in this court." Schlanger asserted "that [Respondent] joined with Mr. Culpepper in an ongoing scheme to keep Mr. Culpepper in an ongoing scheme in control of [BHT], and the result of that since it was carried out through a series of criminal acts is that Mr. Pelletier lost $250,000." The Court inquired, "Why have you just named one as a defendant?" to which Schlanger responded that some question of a release of Culpepper existed "and he [Culpepper] doesn't have any money anyway." The district court observed that he " . . . thought that solvency might have something to do with it." Without ruling on Respondent's motion to dismiss, the district court further admonished Petitioners that the pivotal allegations of the complaint constituted nothing more than conclusions that would have to be repled if they intended to proceed.

Before the district court ruled on Respondent's motion to dismiss, Petitioners filed an amended complaint, which was 70 pages and over 240 paragraphs and

contained 8 counts seeking the same multi-million dollars in damages. The amended complaint was accompanied by four volumes of exhibits – 123 exhibits – and was over five (5) inches thick. Respondent renewed his motion to dismiss the amended complaint, and the district court partially granted Respondent's motion, dismissing a substantial number of Petitioners' federal and state claims under Rule 12(b)(6) for failure to state a claim. The district court allowed to stand Count One (RICO), Count Two (§ 10b and Rule 10(b)(5) securities violations), and Count Five (Georgia's § 10(b) analog), without requiring Petitioners to replead those counts, on the basis that the amended complaint contained *allegations* sufficient to meet the threshold standards of Fed.R.Civ.P. 9(b).

After the district court's order allowing these claims to stand, Respondent answered and counterclaimed for abusive litigation. Discovery proceeded at an intense pace. Numerous depositions were taken, and several motions supported by memoranda, briefs and responses were filed.

After the conclusion of discovery, and the submission of a comprehensive pre-trial order, in August, 1988 – two years and eight months after this action was brought – the district court granted Respondent's motion for summary judgment on all of Petitioners' remaining claims.

Respondent thereafter filed his motion for sanctions pursuant to Rule 11, seeking to recover as sanctions against Petitioners the attorney's fees incurred in his defense through the grant of his motion for summary judgment. Respondent also filed supplemental supporting material establishing the reasonableness of those attorney's fees. Respondent also submitted his bill of costs to the district clerk. Petitioners responded to the motion, disputing Respondent's entitlement to sanctions; however, they did not dispute the reasonableness of the attorneys' fees incurred by Respondent, and did not present any evidence to the district court by affidavit or

otherwise in response to the motion. Petitioners also did not dispute the bill of costs, which were then taxed by the district clerk.

Petitioners timely filed their notice of appeal to the judgment on the Order granting Respondent's motion for summary judgment, and to the district court's earlier order partially granting Respondent's motion to dismiss.

The district court entered an Order denying Respondent's motion for sanctions, and Respondent timely filed his notice of appeal to said Order, which appeal was heard jointly by the Court of Appeals along with the appeal filed by Petitioners.

Oral argument was held on these consolidated appeals on December 12, 1989, and on January 29, 1991, the Court of Appeals issued its opinion in which it determined, in pertinent part: (a) that the district court had correctly granted Respondent's motions to dismiss and for summary judgment, but had erred in failing to grant Respondent's motion to impose sanctions against Petitioners under Rule 11; (b) that the claims brought by Petitioners against Respondent were frivolous when brought, and became even more so as discovery proceeded, and that said claims were intentionally brought and pursued in bad faith; (c) that monetary sanctions pursuant to Rule 11 were appropriate in this case, that they should be imposed jointly and severally against Petitioners, and that the district court should, upon receipt of the Court of Appeals' mandate, award to Respondent a sum of money that would compensate him for the attorney's fees, litigation expenses, and costs he incurred in defending this lawsuit in the district court and in prosecuting his motion for Rule 11 sanctions, including any fees, expenses, and costs Respondent might incur, on remand, in obtaining the award; and (d) that the appeal pursued by Petitioners in connection with the Order granting Respondent's motions to dismiss and for

summary judgment was frivolous under App. Rule 38, and that Respondent was entitled to an award of fees and costs under App. Rule 38, and that on remand the district court should determine the amount of that fee and give Respondent judgment for the full amount thereof against Petitioners, jointly and severally, but should not compensate Respondent for his attorney's services in prosecuting his appeal from the District Court's order denying Rule 11 sanctions.

After denying Petitioners' motion for rehearing limited to that portion of its opinion pertaining to Rule 11 sanctions, the Court of Appeals issued its mandate to the District Court, together with a copy of its opinion.

Respondent then amended his motion for sanctions to include additional attorneys fees, expenses of litigation, and court costs consistent with the opinion of the Court of Appeals, and after giving Petitioners an opportunity to respond to this amended motion, the district court conducted a hearing in accordance with the mandate of the Court of Appeals. During the course of that hearing, Petitioners confirmed that they were asserting no objection to the reasonableness of the attorneys' fees, expenses of litigation, or court costs sought by Respondent.

### C. Statement of Facts.

The following facts are provided to the Court as the facts upon which, in addition to the facts set forth above, the Court of Appeals based its determination that the claims of Petitioners were meritless, were known by Petitioners to be so at the time they filed the complaint, and were brought in bad faith and vexatiously purely to harass Respondent and to extract a settlement from him.

Lokey & Bowden, the law firm of which Respondent was a member, was retained to represent BHT in early September 1984 by its founder, President, Chairman of its

board of directors, and shareholder, C. M. Culpepper ("Culpepper"). Contrary to the suggestion of Petitioner, unsupported by the facts, Lokey & Bowden and Respondent did not represent BHT prior to September. At that time, Petitioner was not involved in the affairs of BHT. Lokey & Bowden represented BHT for several months, until it withdrew as counsel for BHT on or about March 12, 1985.

BHT had several other shareholders in addition to Culpepper. Among them were Messrs. W. Leon Hurst, W. Charles Hurst, and Pelham Robinson (the "Hursts"). On or about November 1, 1984, the Hursts sold all of their stock in BHT to Wil Brown & Sons d/b/a Travel, Incorporated ("Travel, Inc.") in a transaction which was later rescinded, but which was in effect during the period of time relevant to this matter.

In late 1984, Pelletier embarked upon a scheme to takeover BHT and merge it with another travel agency which he already owned. On or about December 29, 1984, he entered into a transaction with the Hursts in which they purported to sell their BHT stock to him. As a part of this transaction, the Hursts secretly tendered their resignations from the board of directors to Pelletier; and agreed not to sign any documents that would bind BHT without obtaining Pelletier's consent. The Hursts also agreed to assign to Pelletier their purported claims against Culpepper for an additional 40% of the stock of BHT by means of a so-called "Litigation Agreement," and agreed to allow Pelletier to hire and pay for a lawyer to represent his interests, while appearing to represent their interests in BHT. That lawyer was Schlanger, who later represented Pelletier both in this case, and in a related case brought against Lokey & Bowden and Respondent in the State Court of Fulton County, Georgia (hereafter the "State Court Action"). This Litigation Agreement was first disclosed when Petitioners attached it as one of the many exhibits to the amended complaint.

Before entering into the transaction with the Hursts, Pelletier told one of his attorneys, Frank M. Conner, III ("Conner") that based upon information he had received he did not trust the Hursts, and instructed Conner to prepare the documents with that in mind. Pelletier described the situation existing at BHT at that time as one of mutual distrust between warring factions. When asked why he went through with the transaction, he stated that he was motivated by "fear and greed" – meaning that he was afraid that if he didn't move quickly he would lose the opportunity to acquire stock which he thought was worth $650,000 for $150,000, because he felt that Culpepper was at the limit of being able to endure the situation, and would probably have dealt with someone else and taken less.

After signing his agreement with the Hursts, Pelletier told Conner to draft a proposed management agreement to present to Culpepper, which was to include a provision transferring managerial and financial control of BHT from Culpepper to Pelletier. The preamble of the agreement drafted by Connor included representations that Pelletier " . . . was in the process of consummating the acquisition of 40 shares . . . " from the Hursts, and that " . . . prior to consummating the acquisition of the shares it is necessary for Pelletier to enter into an agreement with Culpepper outlining certain conditions and agreements with respect to the continued operations and management of [BHT] . . . " This proposed agreement also required Culpepper to affirmatively represent that there were no outstanding claims to his shares, and that in the event this representation was false, Culpepper would owe Pelletier $50,000.00 as liquidated damages. Conner acknowledged that if Culpepper had signed the agreement as drafted he could have been liable for the $50,000.00. Conner also acknowledged that Pelletier did not want Culpepper to know that Pelletier had already entered into an agreement with the Hursts, and Pelletier

acknowledged that he wanted to leave the impression that he was not yet a stockholder of BHT.

On January 8, 1985, Pelletier met Respondent for the first time at a meeting at the offices of Pelletier's attorneys. At that meeting, Respondent was presented with a copy of the proposed management agreement. Respondent reviewed the proposed management agreement, and observed that there was no consideration in the agreement flowing to BHT. Culpepper reviewed the proposed management agreement and concluded that "even a five year old wouldn't sign that thing." Culpepper refused to sign the proposed management agreement. As a result of the information provided at the meeting, Respondent was under the impression that Pelletier was not yet a stockholder of BHT; but, rather, was merely negotiating with the Hursts to buy their stock.

The next day Pelletier set upon a course to pressure Culpepper to turn over operational control of BHT. He wrote a letter to another one of his attorneys, Peter Q. Bassett (hereafter "Bassett"), stating that he wanted to move aggressively toward taking over BHT. Among other things, he asked Bassett to consider: a derivative action against Culpepper to be brought by Langston on grounds of misfeasance and RICO; " . . . as economic pressure, have several of the corporate lenders place Buckhead in default . . . ;" and sit on the resignations of the Hursts and allow them to continue functioning within the business of BHT as officers and employees. Pelletier also observed that "Having to deal with Robinson and Hurst is probably the greatest pressure we can place on Culpepper. Economic pressure would come a close second."

Pelletier enclosed with this letter a statement of facts, which included the following comments: the Hursts had tendered their resignations contingent upon Pelletier's obtaining an agreement with Culpepper; the current status at BHT was bleak, with employees seeking to leave

and take accounts with them; and the Hursts were willing to support Pelletier's position, since, "[t]hey are, of course, fearful of any criminal action for their transgressions."

On January 16, 1985 Pelletier, represented by Bassett, brought suit in Fulton County Superior Court (hereafter the "Superior Court Case") against BHT, Culpepper, and two of the Hursts, represented by Schlanger – whose fees Pelletier was *secretly* paying and whose actions Pelletier was *secretly* controlling. In the Superior Court Case, Lokey & Bowden represented BHT, and Culpepper was represented by a lawyer named Gary P. Bunch. At the same time, Schlanger, at the direction of Pelletier, but in the name of the Hursts, brought suit against Culpepper in the United States district court, in which Culpepper was also represented by Bunch.[2]

Pelletier, through Connor, demanded transfer of the Hursts' stock on BHT's records into his name, but instead of a stock certificate he produced an affidavit stating that the Hursts had lost their stock certificate. Respondent, as corporate counsel to BHT, advised the Hursts and Pelletier that before BHT could act on this demand, it needed some further assurances and protection, including a bond to indemnify the corporation against loss in the event someone else claimed an ownership or security interest in that stock. Neither Pelletier nor the Hursts ever responded to this request. Pelletier did not then disclose, and claimed later that he did not know, that the Hursts had previously sold their BHT stock to Travel, Inc.

For the next three months, Lokey & Bowden, through Respondent and his partners Hamilton Lokey and Gerald

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[2] Pelletier later hired Bunch to represent him in a lawsuit against the Hursts for alleged securities fraud in the sale of their BHT stock to him.

Handley, defended BHT in the Superior Court case, and attempted to provide general corporate representation to BHT in a hostile environment, which involved the secret agreement between Pelletier, the Hursts whose resignations Pelletier held, and Schlanger, who appeared to represent the Hursts while secretly being paid by Pelletier and representing his interests.

In March 1985, Lokey & Bowden and Respondent terminated their representation of BHT, and BHT filed for bankruptcy. Before that occurred, however, Schlanger, secretly acting on behalf of Pelletier, brought a motion in the name of the Hursts in the Superior Court Case seeking a preliminary injunction to have Pelletier's nominee placed in control of BHT. This motion followed a purported Board of Directors meeting at which the Hursts voted, among other things, to fire the law firm of Lokey & Bowden. The Hursts' votes at this meeting were controlled by Pelletier, who used Schlanger to hold up cards saying "yes" and "no." In spite of the purported firing, Schlanger thereafter served his motion upon Lokey & Bowden as counsel for BHT. Out of an abundance of caution, and in an effort to discharge their responsibilities as officers of the court, Respondent's partners Hamilton Lokey and Gerald Handley of Lokey & Bowden appeared at this hearing to report their status to the court; however they did not address the merits of Schlanger's motion. Bunch did not appear at that hearing. At the conclusion of the hearing, the superior court granted the relief sought by Schlanger secretly on behalf of Pelletier.

While the superior court hearing was proceeding, attorney Donald Rickertsen filed a Chapter 11 petition for BHT in the bankruptcy court. Rickertsen believed that Culpepper had the authority to sign that petition. The superior court order placing Pelletier's nominee in control of BHT was made the order of the bankruptcy court by consent of Pelletier and others. Except for filing a proof of claim against BHT for unpaid fees, Lokey &

Bowden and Respondent had no role in, nor significant contact with BHT's bankruptcy case for months after its commencement.

During BHT's bankruptcy case, Pelletier entered into an agreement with Culpepper and others in which he "sold" the stock he claimed to have purchased from the Hursts, and took an assignment of any claims BHT had against Lokey & Bowden and the Hursts. Schlanger openly became Pelletier's attorney in obtaining the claims against the Hursts and Lokey & Bowden. Rickertsen's law firm filed an objection to Pelletier's application to the bankruptcy court to obtain approval of this agreement, stating that the claims could not be assigned under Georgia law, the assignment created an appearance of impropriety, and was not authorized under the Bankruptcy Code. A hearing was held on Pelletier's application, and Rickertsen requested that Respondent and Hamilton Lokey be present as witnesses in opposition to transfer of BHT's claims against the Hursts. Though not called as witnesses, Lokey and Respondent wrote to the bankruptcy judge explaining the facts known to them regarding BHT's claims against the Hursts. Neither Lokey nor Respondent were advised of the ultimate result of Pelletier's efforts until the middle of December, 1985, when Respondent inquired of Rickertsen what had happened, and Rickertsen told Respondent that the assignment of claims against the Hursts had been deleted, but the assignment of claims against Lokey & Bowden had been approved. Upon hearing that, Lokey & Bowden filed a motion to vacate the bankruptcy court Order approving said assignment.

Thereafter, Schlanger, on behalf of Pelletier, filed the State Court Action against Lokey & Bowden and Respondent alleging malpractice and breaches of fiduciary duties purportedly owed to Pelletier by Respondent and

Lokey & Bowden in connection with his claimed purchase of BHT stock from the Hursts. The Georgia Court of Appeals ultimately concluded that the undisputed material facts established that Pelletier was not a stockholder of BHT, and could not bring an action against Lokey & Bowden and Respondent. *Lokey & Bowden v. Pelletier*, 192 Ga.App. 470, 385 S.E.2d 90 (Ga.App. 1989). The Georgia Supreme Court denied Pelletier's Petition for Writ of Certiorari as to this decision. *Id.*

The bankruptcy court conducted a hearing on Lokey & Bowden's motion to vacate the order purporting to assign BHT's "claims" against them to Pelletier, and granted that motion at the conclusion of the hearing. At that time, Petitioners had the complaint in this case served upon Respondent in the bankruptcy court.

After this case had been commenced, and after the district court had admonished Petitioners that they were treading on mighty dangerous grounds and to familiarize themselves with Rule 11, Petitioners filed an application in the bankruptcy court to authorize Pelletier to pursue BHT's claims against Lokey & Bowden. The bankruptcy court appointed attorney John J. Goger (hereafter "Goger") as special counsel to investigate the substance of any claims which BHT might have against Lokey & Bowden, and to analyze the value, if any, of allowing Pelletier to pursue any such claims. Goger, after conducting an extensive investigation, filed his report in the bankruptcy court, concluding that the claims against Lokey & Bowden had no merit, and the risk of an abusive litigation counterclaim and/or Rule 11 sanctions were far greater concerns. The bankruptcy court conducted a hearing on Pelletier's application to pursue claims, denied that application at the conclusion of the hearing, and thereafter entered an order in accordance with this oral ruling.

## REASONS FOR DISALLOWANCE OF THE WRIT

**A. The Court of Appeals, Using its Knowledge of the *Undisputed Material Facts* Gained from its *Plenary* and *De Novo* Review of the *Entire Record* in this Case, Which was Before It in Connection with the District Court's Grant of Respondent's Motions to Dismiss and For Summary Judgment, Properly Concluded that Petitioners had committed Egregious Rule 11 Violations and should be Sanctioned for Those Violations Jointly and Severally.**

The Court of Appeals reviewed Petitioners' appeal from the district court's grant of summary judgment in favor of Respondent using a standard of review which was *plenary* and *de novo*, employing the same legal standard as used in the district court – whether Respondent was entitled to judgment as a matter of law based upon the material facts as to which there was no genuine dispute. *See, Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Mercantile Bank & Trust v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985); and *Carlin Communication v. Southern Bell*, 802 F.2d 1352 (11th Cir. 1986).

The Court of Appeals conducted a similar *plenary* and *de novo* review as to Petitioners' claims which had been dismissed for failure to state a claim under Rule 12(b)(6), again employing the same legal standard as used by the district court – whether it appeared beyond doubt that Plaintiff could prove no set of facts in support of the claims that would entitle him to relief. *Harris v. Kerner*, 404 U.S. 519, 520-21 (1972); and *Wright v. Newsome*, 795 F.2d 964 (11th Cir. 1986). Since discovery had been completed, and a substantial factual record had been developed which contained the purported factual predicate for Petitioners' claims, the legal standard for the review of the district court's grant of summary judgment was also applicable to these claims. *Celotex, supra; Ross v. Bank South*, 837 F.2d 980, 998-99 (11th Cir. 1988).

Using these standards, and conducting a thorough and sifting review of the entire record, the Court of Appeals concluded that Petitioners' claims had no merit, and affirmed the district court's grant of Respondent's motions to dismiss and for summary judgment, after reading Pelletier's complaint "in the light most favorable to him, with respect to the claims dismissed under Fed.R.Civ.P. 12(b)(6), and giving him the benefit of every reasonable inference, with respect to the claims disposed of on summary judgment under Fed.R.Civ.P. 56." *Pelletier v. Zweifel*, 921 F.2d at 1470.

In considering Respondent's cross-appeal from the district court's denial of his motions for sanctions, the Court of Appeals, citing this Court's opinion in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S ___, 110 L.Ed. 2d 359, 110 S.Ct. ___ (1990), acknowledged that it should apply an abuse of discretion standard in reviewing all aspects of the district court's Rule 11 determinations, and that it could reverse the district court only if it found that the district court had abused its discretion. *Pelletier v. Zweifel*, 921 F.2d at 1514.

Using this abuse of discretion standard in the context of having the *entire record* of this case before it, and applying the *undisputed material facts* which established that Respondent was entitled to judgment as a matter of law on *all* of Petitioners' claims, the Court of Appeals determined that the district court had abused its discretion in failing to conclude that Petitioners' conduct violated Rule 11, because it based its ruling on an erroneous view of the law and on a clearly erroneous view of the evidence. *Id.* at 1514. In so concluding, the Court of Appeals observed that the district court had failed to conduct a searching inquiry into the merits of Petitioners'

complaint, and as a result of such failure, the district court developed a clearly erroneous view of the evidence. *Id., Cooter & Gell*, 496 U.S. at ___, 110 L.Ed. 2d at 380.

Using the comprehensive knowledge which it had gained from its own *plenary* and *de novo* review of the entire record of this case, the Court of Appeals concluded that Petitioners' complaint had no reasonable factual basis when pled, that Petitioners knew this, and that when they decided to pursue this action despite their knowledge that it was frivolous, they acted in bad faith. *Id.* at 1515. In support of these conclusions, the Court of Appeals recapitulated some of the evidence which it had earlier recited. In applying the objective standards for determining reasonableness under Rule 11,[3] and construing the evidence most favorably to Petitioners,[4] the Court of Appeals stressed the following facts, among others.

– Pelletier was a lawyer skilled in the law; had been a member of the Georgia bar for nearly 10 years at the time the suit was brought; and had established a Georgia bar review course. *Id.* at 1515, 1519-20.

– Pelletier's claim that he relied on Culpepper's purported promise to turn over control of BHT to him, and that he was defrauded by Culpepper's alleged refusal to

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[3] *See*, for example, *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (*en banc*); *Thomas v. Evans*, 880 F.2d 1235, 1243 (11th Cir. 1989); *Adamson v. Brown*, 855 F.2d 668, 673 (10th Cir. 1988); *White v. General Motors Corp.*, 908 F.2d 675, 680 (10th Cir. 1980); and *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986).

[4] *See*, for example, *Pelletier v. Zweifel*, 921 F.2d at 1497, n.7, where the Court of Appeals states: "Again, for the sake of showing that Rule 11 sanctions are justified, we make these assumptions in Pelletier's favor."

do so (with Respondent's purported conspiratorial assistance) "borders on the preposterous." Rather, the undisputed facts establish that Pelletier expected Culpepper to renege, and took several steps to protect himself, including: keeping his deal with the Hursts to purchase their BHT stock secret from Culpepper and Respondent; making a secret side agreement with the Hursts to control their litigation against Culpepper and their votes as directors of BHT (thereby putting himself in a position to get Culpepper to act by his own misstatements); beginning a campaign to harass Culpepper into submission by causing BHT to go into default with its lenders, and by commencing litigation; and hiring Schlanger to secretly represent his interests while pretending to represent the Hursts. *Id.* at 1515, 1474-79.

– Schlanger became a part of Pelletier's scheme no later than mid-January 1985 (a few days after Pelletier first met Respondent). He was advised of the matters that had occurred prior to his involvement both by Pelletier, and by the lawyers who had been representing Pelletier in his dealings with Culpepper and in the litigation Pelletier was pursuing and intending to pursue against Culpepper. From that time forward, Schlanger represented Pelletier and the Hursts as Pelletier's nominee in all facets of Pelletier's dispute with Culpepper, and knew from first-hand observation, as much as his benefactor/client Pelletier, what the true facts were. "He not only had adequate time to investigate Culpepper's and Zweifel's conduct – he was an eyewitness to much of it; he was able to learn what had transpired without relying upon the credibility, or perceptiveness, of his client." *Id.* at 1520-21, 1478-1488.

– Pelletier and Schlanger both knew, well before they brought the complaint, that Respondent had not defrauded Pelletier, but, rather, had, *under the view of the*

*evidence most favorable to Petitioners,* merely advised a client not to sign an agreement that was one-sided and had no consideration flowing to that client. *Id.* at 1516, 1474-76.

– Each count of Petitioners' original complaint was objectively frivolous when filed. *Id.* at 1517, n. 91, 1495-1513.

– Petitioners were warned by the district court within several weeks after the filing of the original complaint that they "were treading on mighty dangerous grounds" and should acquaint themselves with Rule 11, and that the pivotal allegations of the complaint constituted nothing more than conclusions that would have to be repled. *Id.* at 1492, 1518, 1520

– Instead of abandoning their claims, Petitioners repled the complaint, and in doing so engaged in the same sort of "shot-gun" approach used in the original complaint, "replete with factual allegations that could not be possibly material to any of the causes of action they assert." The differences between the two complaints consisted, essentially of the expansion of the numbered paragraphs from 141 to 241, and four volumes of exhibits were attached to the amended complaint (making the document over five inches thick). The Court of Appeals expressly noted that it undertook the task of deciphering the amended complaint by referring to the four volumes of exhibits, and found that none of the claims had merit. *Id.* at 1517-19.

– In addition to the admonition from the district court, an independent special counsel appointed by the bankruptcy court to examine into claims which Petitioners sought to have assigned to Pelletier, and which were substantially identical to those being pursued in this case, concluded that the possibility of litigation sanctions against the bankruptcy estate of BHT, including Rule 11

sanctions, were sufficiently great not to allow the undertaking of such claims, and the bankruptcy court concurred in such report after a hearing attended by Petitioners, yet instead of abandoning their claims, they continued to press them. *Id.* at 1493-94, 1516.

– Petitioners failed to call to the attention of the Court of Appeals the ruling in the Georgia Court of Appeals that Pelletier never became a stockholder of BHT. This failure to disclose by Petitioners was also cited by the Court of Appeals as a ground for imposing sanctions against them under App. Rule 38, an action about which Petitioners do not complain in their Petition. *Id.* at 1510-11, 1521, 1523.

Based upon these, and other actions of Petitioners, who were themselves participants in the transactions in which they falsely claimed that Respondent had committed serious acts of criminal misconduct, the Court of Appeals concluded that Petitioners had no basis in fact for bringing their claims, that they were brought in bad faith, vexatiously, and for the improper purpose of harassing Respondent, and to extract a settlement from him. *Id.* at 1515, 1517. The Court of Appeals further concluded that Petitioners were responsible for egregious violations of Rule 11, and that because of their joint participation in the activities which occurred both before and after the filing of this action, Petitioners were jointly and severally liable for the sanctions to be imposed under Rule 11. *Id.* at 1522.

Respondent respectfully submits that based upon the undisputed material facts which were before the Court of Appeals, and applying the deferential standard for review of the district court prescribed by *Cooter & Gell, supra,* the Court of Appeals correctly decided these matters.

**B. The Court of Appeals Acted Properly in Determining, on the Record Before It, the Nature of the Rule 11 Sanctions to be Imposed Upon Petitioners, and in Remanding This Matter to the District Court for a Determination of the Amount of Those Sanctions.**

It is clear that monetary sanctions measured by the attorney's fees and litigation expenses incurred by the opposing party are, if the circumstances warrant, appropriate sanctions under Rule 11. *Donaldson v. Clark*, 819 F.2d 1551, 1556-58 (11th Cir. 1987) (en banc); *Cooter & Gell*, 496 U.S. at ___, 110 L.Ed. 2d at 374. *See, also, Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978), applying this concept to an award of attorney's fees in Title VII cases.

The cases cited by Petitioners in support of their argument that the Court of Appeals should not have determined the nature of the sanction appropriate for their conduct in this case, or that the Court of Appeals should have remanded the case to the district court to allow further evidence in "mitigation" of this sanction, do not refute the concept of the use of monetary sanctions for deterrence; indeed, those cases support that concept. *See*, for example, *In re Kunstler*, 914 F.2d 505, 522-23 (4th Cir. 1990); *Doering v. Union County Bd. of Chosen Freeholders*, 857 F.2d 191, 193 (3rd Cir. 1988); *Matter of Yagman*, 796 F.2d 1165, 1184-85 (9th Cir. 1986); *White v. General Motors Corp., Inc.*, 908 F.2d 675, 683-84 (10th Cir. 1990); *Blue v. Dept. of Army*, 914 F.2d 525, 547 (4th Cir. 1990).

The essence of Petitioners' argument is that the Court of Appeals should not have determined the nature of the sanctions to be imposed, but, rather, should have remanded the matter to the district court to give that court another opportunity to take evidence of "mitigating circumstances" that could, according to Petitioners, have some impact upon the amount of the sanctions to be

imposed against them. In making this argument, Petitioners gloss over several factors which establish that this case is not in conflict with the cases cited by Petitioners, and that based upon the specific factual context of this case, those cases are distinguishable.

First, Petitioners gloss over the fact that when this matter was before the district court on Respondent's motion for sanctions, Petitioners failed to avail themselves of the opportunity to submit any evidence to support their belated plea for mitigation. Under Local Rules 270-1 and 220-1 of the United States District Court for the Northern District of Georgia, which are reprinted in the Appendix hereto, parties against whom a motion seeking attorney's fees has been filed must respond in writing within ten (10) days after the service of that motion, and failure to file a response indicates that there is no opposition to the motion. Local Rule 270-1 on the determination of attorney's fees refers to and incorporates the applicable provisions of Fed.R.Civ.P. 43(e), and 78, and reading these various rules *in pari materia* with each other establishes that if parties against whom attorney's fees are sought have matters to present to the district court in opposition to the relief sought, then they must do so by presenting evidence in the form of affidavits or live testimony, depending upon how the court considers the matter. In this case, the district court considered the matter on the written submissions of the parties, which included affidavits submitted by Respondent to establish the reasonableness of the attorney's fees incurred in his defense, and which included a brief from Petitioners, a copy of which is reprinted in the Appendix hereto, which did not address the "mitigating circumstances" which they now claim an entitlement to present. If the district court had ruled, in the first instance, in the manner which the Court of Appeals concluded was required by the undisputed

evidence of record, then Petitioners, having had both the opportunity and the obligation to present such matters to the district court, surely would not have been heard to complain that they did not have their day in court. Since the Court of Appeals merely performed the function which the district court should have performed, but failed to do so, using the same record and the same *undisputed material facts* which were available to the district court, and the same record, including Petitioners' response to Respondent's motion for sanctions, Petitioners have not been deprived of an opportunity to present matters to the district court, *they* merely *failed to do so.* Indeed, the Court of Appeals did remand this matter to the district court for the determination of the reasonable attorney's fees, expenses of litigation, and court costs incurred by Respondent, and Petitioners again waived their opportunity to contest those matters.

In making their argument, Petitioners also ignore the fact that the Court of Appeals had before it the *entire record* of the district court on a *plenary* and *de novo* review, applying the *undisputed material facts* in the record, in connection with Petitioners' appeal from the district court's orders granting Respondent's motions to dismiss and for summary judgment. Under this procedural posture, in ruling on the district court's disposition of Respondent's motion for sanctions, the Court of Appeals was perfectly capable of determining the appropriate form that the sanctions against Petitioners should take. Indeed, the posture of this case before the Court of Appeals put it in an even better position than the district court in assessing Respondent's motion for sanctions, since the district court, out of procedural necessity, had to take up piece-meal and *seriatim* the various motions in this case which were, instead, presented to the Court of

Appeals in consolidated fashion. Moreover, it is significant to note that none of the matters before the Court of Appeals, or the district court before it, required the determination of credibility or the weighing of the sufficiency of evidence; rather, the record, and the issues, before the district court and the Court of Appeals were identical.

In *Cooter & Gell*, this Court observed that the issues involved in determining whether an attorney has violated Rule 11 involve "fact-intensive close calls," and if a Court of Appeals, using a deferential standard, concluded that a district court had relied upon a materially incorrect view of the law or had based its findings on an erroneous view of the law, then the Court of Appeals would be justified in setting aside the district court's ruling. *Id.* 496 U.S. at ___, 110 L.Ed 2d at 380. In emphasizing the benefit of such a deferential rule, this Court stressed that giving the district court the discretion to resolve questions involving "multifarious, fleeting, special, narrow facts that utterly resist generalization" in the Rule 11 context would "streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts already weighed and considered by the district court; it will also discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation." *Id.* 496 U.S. at ___, 110 L. Ed 2d at 381.

Unfortunately, in this case the pursuit by Petitioners of their appeal from the district court's grant of Respondent's motions to dismiss and for summary judgment multiplied, rather than reduced, the underlying litigation; and the failure of the district court, as determined by the Court of Appeals using a deferential standard, to apply the proper discretionary standards to Petitioners' conduct in bringing and pursuing their baseless claims in bad faith, vexatiously, and for the purpose of harassing

Respondent, has spawned, rather than reduced, satellite litigation.

28 U.S.C. § 2106 provides, in pertinent part, that this Court and the Court of Appeals have the power to reverse any judgment or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate order or judgment or require such further proceedings as may be just under the circumstances. This authority has been interpreted by this Court and the Court of Appeals to include the power, in a case before an appellate court on undisputed facts where the appellate court is in the same position as would be the court below, to resolve an issue which was not decided below due to the lower court's erroneous determination of a preliminary issue, and to dispense with the need for further evidentiary hearings if no legitimate purpose would be served thereby. *See*, for example, *Hormel v. Helvering*, 312 U.S. 552, 556-557 (1940); *Perkins v. Matthews*, 400 U.S. 379, 386 (1971); *Moses H. Cone Hospital v. Mercury Constr.*, 460 U.S. 1, 29 (1983); *Forman v. United States*, 361 U.S. 416, 425 (1960), reh. den. 362 U.S. 937, ovrld. on other grounds *Burks v. United States*, 437 U.S. 1 (1978); *Steinfeld v, Zeckendorf*, 239 U.S. 29, 30 (1915); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990); *Joshi v. Florida State University Health Center*, 763 F.2d 1227, 1236 (11th Cir. 1985).

In this case, the Court of Appeals, being required to conduct a thorough and sifting analysis of the entire record in connection with Petitioners' appeal, concluded, based upon the *undisputed material facts* of record that Petitioners' claims had no merit, and due to Petitioners' intimate involvement in the transactions from which the purported claims against Respondent arose, that Petitioners knew that these claims had no merit. The Court of Appeals further concluded, based upon the conduct of

Petitioners also disclosed in the *undisputed material facts* of record, that in bringing and pursuing this case Petitioners acted in bad faith and vexatiously for the purpose of harassing Respondent and hoping to extract a settlement from him. The Court of Appeals further concluded that Petitioners were aware when they filed the initial complaint that their claims lacked merit, and were forcefully reminded thereafter by a United States district judge and a bankruptcy judge that they could be subject to Rule 11 sanctions for bringing and pursuing these claims, yet they persisted in doing so.

Respondent respectfully submits that under the fact specific circumstances of this case, the Court of Appeals had the authority to weigh and consider the *undisputed material facts* before it in connection with its *plenary* and *de novo* review on related matters in determining the proper sanction, rather than sending the case back to the district court for yet another round of "satellite litigation."

Petitioners certainly have no claim that they were not on notice of the potential for Rule 11 sanctions, and, indeed, beginning no later than several weeks after this case was filed they began their futile effort to support and justify these claims, only to see their "facts" evaporate under the scrutiny of discovery and the thorough and sifting analysis performed by the district court and the Court of Appeals. Having been on such notice, and having had their day in court to present matters in mitigation if such were relevant, they should not now be heard to complain.

Considering the egregious facts and circumstances of Petitioners' Rule 11 violations as determined by the Court of Appeals from its review of the *undisputed material facts* of record, the Court of Appeals was authorized to determine that the appropriate sanction to be imposed upon Petitioners, jointly and severally, was to reimburse

Respondent for the attorney's fees, expenses of litigation, and court costs incurred by him in his defense in the district court and in the pursuit of his motion for sanctions. Notwithstanding their failure to present any evidence of "mitigating circumstances" in the district court in response to Respondent's motion for sanctions, any such evidence would pale into insignificance considering their egregious conduct in the underlying transactions and in the bringing and pursuit of this lawsuit falsely accusing Respondent of serious acts of criminal misconduct.[5]

Moreover, the Court of Appeals did provide Petitioners with the opportunity to challenge the reasonableness of the attorney's fees, expenses of litigation, and court costs which Respondent did incur, and Petitioners have chosen not to do so.

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[5] In testifying by affidavit as to the reasonable attorney's fees in this case, Mr. Joseph Lefkoff, a well-respected member of the Georgia Bar, stated, in pertinent part, as follows:

> I personally know the Defendant, Gary D. Zweifel, and my firm has been employed by him from time to time in the representation of him in fiduciary matters where he often acts. It is my belief that a substantial part of his practice relates to fiduciary law, frequently in circumstances where he must be bonded.
>
> When allegations of willful and intentional fraud are made against an attorney with respect to acts performed by him in his professional capacity, his reputation and livelihood are put dramatically in issue. I cannot conceive of a more particularly damaging circumstance for an attorney than to be sued for racketeering, and only a criminal RICO action would be worse than the civil action filed in this case by the Plaintiff against Gary D. Zweifel.

### C. Due to the Fact Specific Nature of the Decision of the Court of Appeals, This Court Should Not Consider This Case on *Certiorari*

In determining that the district court had abused its discretion in failing to conclude that Petitioners' conduct violated Rule 11 because it based its ruling on an erroneous view of the law and on a clearly erroneous view of the evidence, the Court of Appeals had conducted its own thorough and sifting review of the *undisputed material facts* of this case, and concluded that Petitioners had committed egregious violations of Rule 11 warranting the imposition of sanctions measured by the attorney's fees and expenses incurred by their opposing party as a result of their conduct. If this Court were to review the decision of the Court of Appeals, it would be required to conduct its own thorough and sifting review of those facts, because the action of the Court of Appeals, and its determination as to the severity of the conduct warranting sanctions, and the proper sanction to be imposed, are integrally entwined in the facts. Historically, this Court has refrained from granting *certiorari* to review evidence and discuss specific facts, or the inferences from the evidence. *See*, for example, *United States v. Johnston*, 268 U.S. 220, 227 (1925); and *General Talking Pictures Corporation v. Western Electric Company*, 304 U.S. 175, 178 (1938).

## CONCLUSION

Respondent, himself a lawyer, became embroiled in this litigation through no fault of his own, and was the victim of a scheme perpetrated by Petitioners to use the federal court system to harass him into paying money to buy back his good name by filing baseless claims with a significant *in terrorem* impact. Although this scheme may have slipped past a district court harried with the crush of day-to-day litigation, it did not pass the scrutiny of the

Court of Appeals which had the opportunity, given Petitioners' appeal from the grant of Respondent's motions to dismiss and for summary judgment, to review the *undisputed material facts* in a reflective environment in conjunction with Respondent's motion for sanctions. As determined by the Court of Appeals, the conduct of Petitioners represented an "improper use of the civil RICO provisions" in an attempt to "shake down" an opponent and "extort a settlement" at the "expense of the federal judiciary and those who need ready access to the courts." *Pelletier v. Zweifel*, 921 F.2d at 1522. The action of the Court of Appeals in this case was appropriate. Considering the fact specific nature of this case, it is not an appropriate candidate for *certiorari*. This Court should deny Petitioners' writ.

Respectfully submitted,

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## Appendix

28 U.S.C. § 2106 ..... App. 1

Rule 38, Federal Rules of Appellate Procedure .. App. 1

Rule 12(b)(6), Federal Rules of Civil Procedure .. App. 1

Rule 43(e), Federal Rules of Civil Procedure .... App. 1

Rule 78, Federal Rules of Civil Procedure ..... App. 2

Local Rule 220-1, U.S.D.C.N.D.Ga ..... App. 2

Local Rule 270-1, U.S.D.C.N.D.Ga ..... App. 3

Response of Plaintiff to Defendant's Motion for Sanctions, filed in the district court on March 16, 1989 ..... App. 5

## STATUTES AND RULE PROVISIONS INVOLVED

**Title 28, United States Code, Section 2106:**

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

**Rule 38, Federal Rules of Appellate Procedure:**

> If a court of appeals shall determine that an appeal is frivolous, it may award just damages, and single or double costs to the appellee.

**Rule 12(b)(6), Federal Rules of Civil Procedure:**

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . A motion making any one of these defenses shall be made before pleading if a further pleading is permitted. . . .

**Rule 43(e), Federal Rules of Civil Procedure:**

> **(e) Evidence on Motions.** When a motion is based on facts not appearing of record the court may hear the matters on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition.

**Rule 78, Federal Rules of Civil Procedure:**

> Unless local conditions make it impracticable, each district court shall establish regular times and places, at such intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge may at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions.
>
> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

**Rule 220-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia – Filing of Motions and Responses; Hearings**:

> **(a) Filing of Motions.**
>
> (1) Every motion presented to the clerk for filing shall be accompanied by a memorandum of law citing supporting authorities and, when allegations of fact are relied upon, by supporting affidavits. Motions not in conformance with this rule shall not be accepted for filing.
>
> (2) Specific filing times for some motions are set forth below. All other motions must be filed WITHIN 100 DAYS after the complaint is filed, unless the filing party has obtained prior permission of the Court to file later.
>
> **(b) Response to Motion.**
>
> (1) Each party opposing a motion shall serve his response, responsive memorandum, affidavits, and any other responsive material not

later than ten days after service of the motion, except that in Cases of motion for summary judgment the time shall be twenty days after the service of the motion. Failure to file a response shall indicate that there is no opposition to the motion.

(2) Although a reply by the movant shall be permitted, it shall not be necessary for the movant to file a reply as a routine practice. When the movant deems it necessary to file a reply brief, that brief shall be served not later than ten days after service of the responsive pleading. No further briefs may be filed by the parties, except upon order of the Court.

**(c) Hearings.** All motions shall be decided by the Court without oral hearing unless a hearing is ordered by the Court.

**Rule 270-1, Local Rules of Practice for the United States District Court for the Northern District of Georgia – Attorney's Fees – Procedure for Determination:**

If a final judgment, including a judgment made final under F.R.Civ.P. 54(b), does not determine (or establish the procedures for determining) the amount of attorney's fees which are authorized by federal statute to be awarded by the Court to or on behalf of a prevailing party or which may be sought under the equitable or inherent powers of the Court, the following procedures shall apply:

(1) The award of such fees (and expenses incident thereto not ordinarily allowable as taxable costs) shall be requested by special written motion addressed to the Court and shall not be included in a cost bill, in a motion for taxation or retaxation of costs, or in a motion under F.R.Civ.P. 50(b), 52(b), or 59.

(2) The motion shall be filed with the Clerk of Court and, in accordance with Rule 5, Federal Rules of Civil Procedure, shall be served upon the parties against whom the award is sought at least 10 days prior to the expiration of the time within which such opposing parties can file a timely notice of appeal from the judgment under Rule 4(a)(1, 3-6), Federal Rules of Appellate Procedure.

(3) The motion shall specify the judgment and the statute or other grounds on the basis of which entitlement to the award is claimed and shall state the amount (or provide a fair estimate of the approximate amount) of the fees and expenses sought. Within 30 days (or such other period as the Court may prescribe) after filing the motion, the movant shall file and serve a detailed specification and itemization of the requested award, with appropriate affidavits and other supporting documentation.

(4) Hearings on the motion shall be conducted by the Court in accordance with F.R.Civ.P. 43(e) and F.R.Civ.P. 78 and in accordance with applicable statutory and decisional standards and principles.

(5) Pendency of a motion filed under this rule does not extend the time for appealing from, or for filing a motion under F.R.Civ.P. 50(b), 52(b), or 59 directed to the judgment giving rise to the claim for attorney's fees. The Court may, however, take the motion into consideration in ruling upon a motion for extension of time for appealing filed under F.R.A.P. 4(a)(5).

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FILED MAR 16 1989

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By: /s/ Illegible
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RONALD O. PELLETIER,
Plaintiff

v.

GARY D. ZWEIFEL,
Defendant

Civil Action
Number
1:86-CV-156-ODE

## RESPONSE OF PLAINTIFF TO DEFENDANT'S MOTION FOR SANCTIONS

This suit was brought by Mr. Pelletier against an attorney, Mr. Zweifel, charging that Mr. Zweifel's actions in connection with a corporate dispute and subsequent litigation constituted various breaches of duty and of law. This Court granted summary judgment on the basis that, although most of the material allegations contained in the complaint had factual support, they did not amount to violations of the law.

Defendant claims that he is entitled to Rule 11 sanctions because (a) there was no factual basis for the allegations contained in the complaint and (b) the complaint

was filed for no proper purpose but, rather, for harassment of the defendant, Defendant's Memorandum, p. 27.[1] He is in error on both points and plaintiff should not be subject to any sanction.

## Factual basis

First, it is clear that there *was* a factual basis for all of the material allegations of the complaint. Though the Court granted the defendant summary judgment, that ruling was based upon an application of the law to those facts, not on a failure to substantiate the allegations. Moreover, in the companion litigation which was filed in State Court of Fulton County, this defendant was *denied* summary judgment based upon essentially the same material facts and on the same discovery as was used in this case.[2]

The defendant will not reiterate here his enumeration of the facts and the evidence and testimony which supports each, but instead – in the interest of efficiency and conservation of space (not to mention trees and paper) – incorporates his "Memorandum in Response to Defendant's Motion for Summary Judgment" (filed September

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[1] The defendant does not claim that he is entitled to sanctions because the complaint advanced "a legal theory that has no reasonable chance of success under the state of the decisional or statutory law and that [could not] be advanced as a reasonable argument to reverse, modify or extend the law", Defendant's Memorandum, p. 26-27.

[2] The State Court litigation stated claims for relief which were different from those stated in this action, but they were based on the same actions of the defendant.

29, 1987) and his "Response to Defendant's Statement of Material Facts and Counter-Statement of Material Facts As To Which There Is, At Least, a Genuine Issue for Trial" (filed September 29, 1987). A review of these documents demonstrates that this lawsuit was *not* filed without a basis in fact; they show that there was an *abundance* of facts to support the allegations in the complaint. The Court simply disagreed with the plaintiff on certain inferences which might reasonably be drawn from certain of those facts and on the application of the law to those facts.

Whatever one's view of the wisdom of bringing this suit or of the ultimate merit of the claims, this suit did not contain the sort of outrageous, baseless allegations or unconsionable behavior at which Rule 11 was aimed. Cf. *Jorgenson v. County of Volusia*, 846 F.2d 1350 (11 Cir., 1988) (failure to cite adverse, known controlling precedent to court in application for TRO); *Collins v. Walden*, 834 F.2d 961 (11 Cir., 1987) (completely unsupported and unsupportable allegations of conspiracy to deprive divorce litigant of civil rights filed by attorneys who had reason to know of the impossibility of proof); *Rolleston v. Eldridge*, 848 F.2d 163 (11 Cir., 1988) (suit brought by attorney against Judge Eldridge of the Georgia Superior Court in the face of absolute judicial immunity, but sanctions *denied*).

As the Eleventh Circuit noted in *U.S. v. Milam*, 855 F.2d 739 (1988) (affirming imposition of sanctions for pursuing frivolous statute of limitations defense in action by Government to collect on federally insured student loans):

> . . . . Rule 11 sanctions were designed to "discourage dilatory or abusive tactics and help to

> streamline the litigation process by lessening frivolous claims or defenses." [Donaldson] at 1556 (citation omitted).

Here there were no "dilatory or abusive tactics" and the claim – based upon the breaches of duty owed by the defendant to the plaintiff – were well-founded in fact.

> Sanctions under rule 11 are meant to eliminate frivolity and harrassment, not attorney zealousness. . . . See also *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1540 (9th Cir. 1986).
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> *Jean v. Nelson*, 863 F.2d 759 (11 Cir., 1988).

"The rule should not be used to deter potentially controversial or unpopular suits. . . . The Advisory Committee Note specifies that the rule 'is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.' " *Donaldson v. Clark*, 819 F.2d 1551, 1561 (11 Cir., 1987) (en banc). In this case we have had a determination by the State Court of Fulton County – on the same set of facts as was before this Court – that Mr. Zweifel owed Mr. Pelletier a duty and that, for purposes of summary judgment, it could not be said that Mr. Zweifel did not breach that duty. There was, therefore, a factual basis for this suit; only the legal theories upon which recovery could be had were at issue. Since the defendant is not claiming that sanctions should be awarded for the bringing of a legally frivolous claim,[3] his motion should be denied.

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[3] In fact, the claims in this Court were not legally frivolous since, for the most part, the claims withstood the defendant's motion to dismiss. See, Order of January 9, 1987.

Purpose of the suit

The defendant claims that this suit was filed to "harass" him. There is not one iota of evidence that such is the case. All that was being sought was monetary damages to make the plaintiff whole. No litigation tactics or strategies were employed which burdened the defendant unduly or cost him unwarranted time, trouble or expense. Neither the plaintiff nor his counsel ever attempted to publicize the allegations of the complaint or to otherwise embarrass the defendant. Plaintiff and his counsel cooperated with the defendant's counsel in coordinating discovery so that wasteful, duplicative discovery could be avoided. No relief was asked and no demand was made of the defendant that was in any way improper. There is no indication that the plaintiff was seeking any other than to be made whole and no such base motive can be imputed to him. Certainly, defendant's *ipse dixit* is an insufficient basis upon which to find an "improper purpose". Here, as in *Nesmith v. Martin Marietta Aerospace*, 833 F.2d 1489 (11 Cir., 1987), there is no evidence of any "improper purpose", so sanctions on that ground would by unwarranted.

## CONCLUSION

Having prevailed in the State Court against a motion for summary judgment on the same facts as were alleged in the complaint in this action, and there being no evidence of improper motive in bringing this suit, the defendant's motion should be denied.

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